IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 807

MALCOLM H. MACBRYDE, JR., INDIVIDUALLY, AND AS ADMINISTRATOR C. T. A. OF LEROY PARKER, DECEASED, AND MARY D. WINDER, INTERVENER,

Petitioners,

vs.

ALICE D. PARKER, EXECUTRIX OF ROBERT B. PARKER, DECEASED, AND ALSO INDIVIDUALLY, AND ROBERT B. PARKER, JR.

No. 808

MALCOLM H. MACBRYDE, JR., INDIVIDUALLY, AND AS ADMINISTRATOR C. T. A. OF LEROY PARKER, DECEASED, AND MARY D. WINDER, INTERVENER,

Petitioners,

vs.

JOHN W. DAVIDGE, INDIVIDUALLY, AND AS TRUSTEE OR ASSIGNEE OF ELEANOR RIDGELY PARKER AND AS EXECUTOR OF HER ESTATE, AND CATHERINE RIDGELY BROWN.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JAMES MORFIT MULLEN,
Counsel for Petitioners.

The Daily Record Co. Print, Baltimore.

INDEX

Subject Index

Cases Cited

Statutes Cited

Texts Cited

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.....

MALCOLM H. MACBRYDE, JR., INDIVIDUALLY, AND AS ADMINISTRATOR C. T. A. OF LEROY PARKER, DECEASED, AND MARY D. WINDER, INTERVENER,

Petitioners,

vs.

ALICE D. PARKER, EXECUTRIX OF ROBERT B. PARKER, DECEASED, AND ALSO INDIVIDUALLY, AND ROBERT B. PARKER, JR.

No.....

MALCOLM H. MACBRYDE, JR., INDIVIDUALLY, AND AS ADMINISTRATOR C. T. A. OF LEROY PARKER, DECEASED, AND MARY D. WINDER, INTERVENER,

Petitioners,

vs.

JOHN W. DAVIDGE, INDIVIDUALLY, AND AS TRUSTEE OR ASSIGNEE OF ELEANOR RIDGELY PARKER AND AS EXECUTOR OF HER ESTATE, AND CATHERINE RIDGELY BROWN.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and His Associate Justices of the Supreme Court of the United States:

Your petitioners, Malcolm H. MacBryde, Jr., individually and as Administrator c. t. a. of LeRoy Parker, deceased,

and Mary D. Winder, Intervener, respectfully pray that writs of certiorari issued to review the decrees and decision of the United States Circuit Court of Appeals for the Fourth Circuit, entered on December 30, 1942.

A joint petition is filed in these two cases, because in both, the issue is the same, and the Circuit Court of Appeals filed a single opinion. Separate decrees were entered.

The decrees and decision here sought to be reviewed, reversed the United States District Court for the District of Maryland, which by the Honorable W. Calvin Chesnut, had on June 9, 1942, entered an opinion construing a Maryland will. Final decrees were entered on August 17, 1942 and on October 12th, 1942, from which the respective appeals below were taken to the Circuit Court of Appeals (numbered therein 4997 and 5019) (R., pp. 31 and 52).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240, of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C. Title 28, section 347). The decrees of the United States Circuit Court of Appeals for the Fourth Circuit to be reviewed were entered on December 30, 1942 (R., pp. 46 and 56).

REASON FOR GRANTING THE WRITS.

The Circuit Court of Appeals for the Fourth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions.

The District Court followed the only applicable Maryland decision. The Circuit Court of Appeals refused to adhere to that case; but followed two other Maryland decisions. The latter Court characterizes those two cases inaccurately, as later referred to in the brief. A correct char-

acterization of those two cases shows that they are entirely inapplicable.

The Circuit Court of Appeals made a further ruling based on an authority quoted from by it. This quotation (amplified later with text—quoted in our brief) shows that the correct law is the very opposite of that applied by the Circuit Court of Appeals.

Petitioners aver that the Circuit Court of Appeals decided this case on two grounds more or less alternative in their nature (R., p. 46), both of which are in conflict with the Maryland Law, and neither of which is the law anywhere else. Such rulings should not stand as an exposition of Maryland law, to be followed by Federal Courts in like cases.

STATEMENT OF MATTER INVOLVED.

Mary Donaldson, late of Baltimore City, by a will probated in Baltimore City, left a trust fund to her niece, Sara J. Parker, for life. She further provided in her will, a power to this life tenant, Sara J. Parker, to dispose of this corpus "to her brothers and sister of the whole blood in such proportions as she may designate by her last will and testament" (R., p. 1).

When this will was probated there were four subjects for appointment (three brothers and one sister). One brother died. This made him (and his representatives) ineligible for appointment. Sara Parker later made a will giving the fund "in equal parts" to the three remaining subjects. A second subject died before the life tenant. She did not change her will (R., p. 2).

The District Court said the power was validly exercised in favor of the two survivors, because the death of the

other two had made them ineligible for appointment (Opinion, R., p. 8).

The Circuit Court of Appeals reversed the District Court. It made two alternative determinations (Opinion, R., p. 36).

(1) That the power was non-exclusive and the donee (Sara Parker) could not omit any of the four subjects. Death of the first subject made him ineligible—nevertheless, the omission to name him in exercising the power created a total invalidity in its exercise.

(2) That the death of one of the *three* subjects named in Sara Parker's will caused a lapsing of the provision for him. This lapsing, or partial invalidity in the exercise of the power, caused the whole exercise to be void.

QUESTIONS PRESENTED.

We here reverse the order of the two propositions so as to handle the Maryland decisions more conveniently.

(1) Whether, when a special power of appointment exercisable by will, created by the will of a Maryland resident, and probated in Maryland, has been exercised in favor of three subjects, two of whom are eligible for appointment;—such exercise was rendered totally invalid because one of the subjects (originally eligible, when the donee of the power made her will) later became ineligible by reason of death prior to the donee.

(2) Whether, when a special power of appointment exercisable by will, originally conferred by the will of a Maryland resident and probated in Maryland, is a non-exclusive power (so decided by the Circuit Court of Appeals and assumed, but not conceded by petitioners to be such) with four possible subjects for appointment, and is

exercised by appointing the only three subjects eligible when the will exercising the power was executed;—this exercise of the power is totally void, merely because the donee did not include in her exercise of the power, a fourth subject who died before she made her will, and who thus was concededly ineligible.

Importance of the Question of Local Law.

The testatrix here used a customary form to create a special power of appointment by will. Originally four persons were eligible subjects for appointment. Two died before the donee of the power. The donee omitted one entirely from her will. She included the other one. Death disqualified both of them. The Circuit Court of Appeals said the power as exercised was totally invalid, *first*, because one ineligible appointee was excluded, and, *second*, because the other ineligible appointee was included. Such a decision means that if any appointee predeceases the donee, the power is impossible of execution. This is not the Maryland Law.

There can be no question now, but that the construction of the will here involved is a matter in which the Maryland testamentary law is controlling:

Erie R. R. v. Tompkins, 304 U. S. 65.
Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202-208/9.
Fidelity Trust Co. v. Field, 311 U. S. 169.

The Maryland Law in Conflict with the Decision Sought to be Reviewed.

The District Court upheld the exercise of the power in favor of the two surviving appointees upon the clear authority of a decision by the Court of last resort in Maryland—

Graham v. Whitridge, 99 Md. 248.

We quote the following from the opinion of His Honor, Judge Chesnut in the District Court, in which he commented upon and quoted from this Maryland decision:

> "In the course of the opinion the late Chief Judge McSherry, whose depth of legal learning and power of forceful exposition was well known in Maryland, referred with approval to Sugden on Powers, Vol. 2, p. 102—
>
> 'to the effect that the well appointed portions will stand and the appointees of such well appointed portions will not be excluded from shares of the unappointed part if they belong to the class which takes' ". (R., p. 19).

Petitioners claim that the real controversy in this case below pertained to other phases of the two wills here involved; and that the main point on which the Circuit Court of Appeals reversed the District Court is one about which His Honor Judge Chesnut said:

> "It was suggested here by counsel for the estate of Robert Parker that if the appointment of Robert was invalid, the exercise of the appointment might be held invalid as a whole as in these Maryland cases, but I do not understand that this argument was seriously pressed and I think there is no reasonable basis for accepting it as sound". (R., p. 20).

WHEREFORE, your petitioners submit that this petition for the writs of certiorari should be granted as prayed.

JAMES MORFIT MULLEN,
Counsel for Petitioners.